SC84706

IN THE
SUPREME COURT OF MISSOURI

SHERYL WYRECK-HAAKE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Denial of Postconviction Relief
of the Circuit Court of Ray County, Missouri
8th Judicial Circuit
The Honorable Werner A. Moentmann, Presiding Judge

APPELLANT'S SUBSTITUTE BRIEF

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I N D E X

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

U.S. CONSTITUTION

MISSOURI CONSTITUTION

LAW REVIEW ARTICLE

JURISDICTIONAL STATEMENT

Appellant, Sheryl Wyreck-Haake, appeals the denial of her Rule 24.035 motion for postconviction relief, following an evidentiary hearing, by the Circuit Court of Ray County. On November 2, 1999, Sheryl pled guilty to two counts of statutory sodomy in the first degree, Section 566.062, RSMo 1994,[1] one count of statutory rape in the first degree, Section 566.032, RSMo, and two counts of the class D felony of endangering the welfare of a child in the first degree, Section 568.045.1(2), RSMo Cum. Supp. 1998.

On January 11, 2000, the Honorable Werner A. Moentmann, Judge, sentenced Sheryl to a total of twenty years imprisonment, as follows: seventeen years for each count of statutory sodomy (counts I and III); seventeen years for statutory rape (count II); and three years for each count of endangering the welfare of a child (counts IV and V). The Court ordered counts I, II, and III run concurrently with each other but consecutively to counts IV and V. Sheryl was delivered to the Missouri Department of Corrections on January 12, 2000.

Sheryl timely filed a *pro se* and an amended motion for postconviction relief on March 8, 2000, and June 8, 2000, respectively. On February 27, 2001, Judge Moentmann denied Sheryl's claims for postconviction relief.

Sheryl timely filed a Notice of Appeal on April 2, 2001. On June 11, 2002, the Missouri Court of Appeals, Western District, affirmed Sheryl's convictions. On June

[1] All statutory references are to RSMo 1994 unless otherwise indicated.

26, 2002, Sheryl timely filed a motion for rehearing or, in the alternative, application for transfer, which was denied on July 30, 2002. On August 14, 2002, Sheryl timely filed an application for transfer in this Court. On October 22, 2002, this Court sustained Sheryl's application for transfer. Jurisdiction therefore lies in the Supreme Court of Missouri.

STATEMENT OF FACTS

On June 1, 1999, the State charged Appellant, Sheryl Wyreck-Haake,[2] by Information filed in Ray County Case CR499-175FX with two counts of statutory sodomy in the first degree, Section 566.062, RSMo, one count of statutory rape in the first degree, Section 566.032, RSMo, and two counts of the class D felony of endangering the welfare of a child in the first degree, Section 568.045.1(2), RSMo Cum. Supp. 1998 (L.F. 1, 6-11, 12-17).[3] The State also charged four misdemeanor counts, which were later dismissed as part of a plea agreement (L.F. 8-9, 14-15). All of the charges pertained to a one-week relationship Sheryl had with a thirteen-year-old boy who was a student at the school where Sheryl was a teacher's aide (L.F. 6-11, 12-17, 32-34, 37-38, 49-50, 76, 78-79, Tr. 47-51, Mov. Exs. 2-9).

The State made the following nonbinding plea offer in Sheryl's case: in exchange for Sheryl's guilty pleas to counts I-V, the State would recommend a total of twenty years imprisonment, with sentencing to the 120-day callback program (pursuant to Section 559.115 RSMo) on all five counts[4] (L.F. 18-20, Tr. 9-10, 35-36).

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[2] The correct spelling of Sheryl's maiden name is "Wyrick."

[3] The Record on Appeal consists of the legal file (referenced "L.F."), the transcript of the postconviction hearing (referenced "Tr."), and Movant's Exhibits 1-10 (referenced as "Mov. Ex. __").

[4] The sentences recommended for each count were: seventeen years on count I (statutory sodomy), seventeen years on count II (statutory rape), seventeen years on

Thus, if the court chose to call Sheryl back and she successfully completed probation, she would be incarcerated for only 120 days. The plea agreement allowed defense counsel to argue for straight probation (L.F. 19, 30, Tr. 11, 36, 47, Mov. Ex. 1, p. 8).

Sheryl's family members discussed the State's offer with defense counsel (Mov. Ex. 1, p. 7-8; Tr. 30-31). Counsel said he believed the State's offer was "a fair offer" and that he was very comfortable that the State's recommendation would be followed (Tr. 30- 31). In addressing the fact that this was a "nonbinding" agreement, counsel explained to the family that "the judge doesn't have to go along with the State's recommendation, but they almost always do" (Mov. Ex. 1, p. 8). Counsel told Sheryl that the court did not have follow the State's recommendation, but that ninety-nine percent of the time courts follow what the State recommends (Tr. 36).

Sheryl's guilty plea was set for November 2, 1999 (L.F. 25, 27). Just before the plea, a probation officer informed Sheryl and defense counsel that the court could not order the 120-day callback on the first three counts, statutory rape in the first degree and statutory sodomy in the first degree[5] (Tr. 12-13, 37-38). Counsel checked the

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count III (statutory sodomy), three years on counts IV and V (endangering the welfare of a child), with counts I-III running concurrently with each other and counts IV and V running concurrently with each other but consecutively to counts I-III.

[5] Section 559.115.5, RSMo Cum. Supp. 1998, states: "probation may not be granted pursuant to this section to defendants who have been convicted of . . . statutory rape in the first degree . . . [and] statutory sodomy in the first degree . . .."

statute and verified that Sheryl was, in fact, ineligible for the 120-day program on counts I, II, and III (Tr. 13, 38). Counsel discussed the matter with the prosecutor and probation officer in Judge Moentmann's chambers (Tr. 13, 38).

Defense counsel and the State agreed to modify their nonbinding plea agreement as follows: sentencing would occur first on counts IV and V, the two D felonies (L.F. 31, 106, Tr. 13-14, 42). The State would recommend concurrent sentences of three years imprisonment with the 120-day callback on those two counts (L.F. 30-31, Tr. 30). A second, subsequent sentencing hearing would be held later for sentencing on counts I, II, and III (L.F. 106, Tr. 14, 42). At the later sentencing, the State would recommend concurrent terms of seventeen years imprisonment on counts I, II, and III, run consecutively to counts IV and V, a suspended execution of sentence, and straight probation (Tr. 13-14, 38-39, L.F. 19, 30-31, 46-47, 106). Implicit in this nonbinding agreement was that if the court chose not to sentence Sheryl to the 120-day callback program on the two D felonies, the State and the defense would have further discussions regarding the State's sentencing recommendation on counts I-III (L.F. 46-47, 106, Tr. 14, 38, 42).

On November 2, 1999, Sheryl pled guilty to counts I-V pursuant to the modified nonbinding plea agreement (Tr. 14, 31, 38-39, L.F. 19, 25, 27-41, 46-47, 106). During the plea hearing, defense counsel questioned Sheryl about her understanding of her nonbinding plea agreement with the State as follows:

Q: Did you understand that there is a plea agreement in this case?

A: Yes.

Q: And do you understand that this plea agreement is for you to enter a plea of guilty to counts I, II, and III, and your sentence is seventeen years in the Missouri Department of Corrections?

A: Yes.

Q: And at a certain time we'll argue for probation, and the Court will decide whether to give you probation or not?

A: Yes.

Q: Do you understand that in addition, you'll plead guilty -- or there'll be what's called an Alfred [sic] plea to counts IV and V, with a three-year sentence to run concurrent to each other; but those three years to run consecutive to the seventeen years in counts I, II and III?

A: Yes, I do.

Q: And do you understand that at the time of sentencing -- do you understand we're asking the Court to do a presentence investigation, and then come back for sentencing in January; and at that time, the Court will decide whether to impose those sentences, grant probation, and that at that time, the Prosecutor will be recommending a 120-day call back?

A: Yes.

Q: And do you understand that if the Court goes along with the Prosecutor's recommendation of 120-day call back, he'll sentence you on that date to count IV and V, or even to the Missouri Department of Corrections, and then decide whether to bring you back after 120 days?

A: Yes.

Q: Do you understand that the plea agreement is not binding on the Court?

A: Yes.

Q: Do you understand if the Court does not accept the plea, or does not go along with our argument and do something that we are in agreement with, you would not be allowed to withdraw the plea?

A: Yes.

(L.F. 30-31).

Neither the court nor defense counsel specifically informed Sheryl during the plea proceeding that the aspect of the plea agreement whereby the parties agreed to delay sentencing on counts I, II, and III, was not binding upon the court (L.F. 27-41). The court accepted Sheryl's pleas of guilty and set sentencing for January, 2000 (L.F. 40-41).

Based on defense counsel's representations, the Wyrick family believed that "the worse-case scenario we would get a sentence of somewhere around three years; best case scenario, we would walk out with straight probation. Most likely we would get a sentence of three years with a 120-day call back, and a recommendation of probation after that" (Tr. 30).

On January 11, 2000, the court called the case for sentencing (L.F. 43, 45). Both Sheryl and defense counsel believed that Sheryl would be sentenced only on counts IV and V, the two class D felonies, at that hearing (Tr. 14-15, 38, 42, L.F. 106).

The court asked the parties to state the plea agreement, and the prosecutor stated as follows:

> Your Honor, the State agreed to recommend the sentence of three years on each of the two class D felonies, and that those sentences run concurrently, and that she be committed and serve those under the 120-day rule with the Court reserving jurisdiction under Section 559.115.
>
> In addition, that if the Court does that, she – if the Court does recall her or whatever happens – she would eventually be sentenced to 17 years consecutive for the statutory rape and the statutory sodomy, and the statutory sodomy charges [sic].
>
> We also agreed that they could argue for probation, or whatever the Court desired to do with respect to all of it and not use the 120; but the recommendation of the State is to use the 120.

(L.F. 46-47). After this recitation of the plea agreement, the following discussion was had between the parties:

Court: Okay. The State would be recommending a straight probation then on the longer if the 120?

Defense: Yes, it is.

Court: Is that the agreement?

State: Assuming the Court calls her back; yes, sir, that would be the agreement.

Court: Okay.

(L.F. 47). The court then questioned Sheryl about her understanding of the nonbinding plea agreement:

Court: Okay. Mrs. Haake, do you understand that that was going to be the recommendation of the prosecuting attorney's office?

Sheryl: [Nods head.]

Court: You need to answer verbally.

Sheryl: Yes.

Court: Do you understand that's only a recommendation?

Sheryl: Yes.

Court: Do you understand that the Court is not bound by that recommendation?

Sheryl: [Nods head.]

Court: Verbally, please.

Sheryl: Yes.

Court: Do you understand that the Court could impose a sentence greater than or less than what was recommended by the prosecuting attorney?

Sheryl: Yes.

Court: Do you further understand that if the Court did not follow that recommendation, you would not be allowed to withdraw your plea of guilty?

Sheryl: Yes.

(L.F. 47-48). With respect to the nonbinding nature of her plea agreement, Sheryl was specifically informed that the court did not have to follow the recommendation of the

prosecutor, that it could impose "a sentence greater or less than what was recommended", and that she would not be permitted to withdraw her plea (L.F. 48). However, Sheryl was not specifically informed that the court was not bound to follow the agreement by the parties that she be sentenced first on only counts IV and V, and that sentencing on counts I, II, and III, would occur at a second, subsequent sentencing hearing (L.F. 45-107).

Following the discussions regarding the terms of the nonbinding agreement, a probation officer summarized Sheryl's pre-sentence investigation for the court (L.F. 49-50). Defense counsel presented evidence, and the victim's mother addressed the court (L.F. 51-91, 92-94).

Attorneys on both sides made their arguments. Defense counsel requested that Sheryl be allowed to serve 120 days in the Ray County jail in thirty or fourty-five-day increments over the summer months so that she could retain custody of her children (L.F. 95-96, 98). The State asked that the 120 days be served in prison and not over the summer months (L.F. 98).

The court took a brief recess before pronouncing sentence (L.F. 99-100). When the parties reconvened, the court asked "[i]s there any reason why the Court should not now impose sentence?" (L.F. 100). Defense counsel answered no, failing to clarify for the court that Sheryl's agreement provided that she would only be sentenced on counts IV and V at that time (L.F. 100). The court sentenced Sheryl to concurrent terms of seventeen years imprisonment on counts I, II, and III, and concurrent terms of three years imprisonment on counts IV and V, but ran the sentences of counts IV and V

consecutive to counts I, II, and III, for a total of twenty years imprisonment (L.F. 102-103).

The court asked Sheryl about her satisfaction with the assistance of counsel, and found no cause for any claim of ineffectiveness of counsel (L.F. 104-105). Defense counsel asked the court to repeat its sentence (L.F. 105-106). After the court restated the sentences, counsel stated, in part:

> As the Court will recall, it was the recommendation of the State that she be sentenced today only on counts IV and V, and that she be returned for a decision as to whether the sentence on the seventeen years.

(L.F. 106). The court responded "[t]he Court has made its judgment" (L.F. 107). Immediately after the sentencing proceeding was concluded, defense counsel, stunned about what had occurred, told Sheryl's brother that he was "speechless" (Tr. 32).

Postconviction Case

Sheryl was delivered to the Missouri Department of Corrections on January 12, 2000 (Tr. 34, L.F. 109). Sheryl timely filed a *pro se* Rule 24.035 motion (L.F. 109-115), which was amended by appointed counsel (L.F. 116, 120, 121-137). Two claims were raised in the amended motion.

Claim One

First, Sheryl claimed that plea counsel was ineffective for failing to timely object to the court's sentencing Sheryl on counts I, II, and III, and for failing to timely clarify for the court that an aspect of the plea agreement was that she be sentenced first on counts IV and V only (L.F. 122-123, 124-130).

Sheryl argued that she relied on this aspect of the plea when she decided to plead guilty (L.F. 122).[6] This aspect of the agreement was crucial because counts IV and V, the D felonies, were the only counts for which Sheryl was eligible for the 120-day callback program (L.F. 122). The agreement was that, depending on the court's sentences on the D felonies, the State would recommend probation on counts I, II, and III, the three unclassified felonies. (L.F. 122-123). Implicit in her agreement with the State was that if the court did not follow the State's recommendation that she be sentenced to the 120-day callback program, the State and defense counsel would further discuss the State's recommendations on counts I, II, and III (L.F. 46-47, 106, 123, Tr. 14, 38, 42). Although Sheryl pled guilty knowing that the State's recommendation as to the sentences imposed by the court was nonbinding, she was never advised that the court had the discretion to alter the aspect of her plea agreement about the order of sentencing and opt to sentence her on all counts at once (L.F. 128).

Sheryl argued in her amended motion that defense counsel's failure to object when the court departed from the aspect of the agreement that she first be sentenced on the D felonies rendered her guilty plea unknowing, unintelligent, and involuntary, and stripped her of what little benefit she had to gain from the plea agreement (L.F. 123). Sheryl further argued that her attorney's failure to protect her reasonable expectations

[6] In the amended motion, counts I, II, and III are characterized as "class A felonies," but they are actually unclassified felonies with a range of punishment of five years to life imprisonment. Sections 566.032 and 566.062 RSMo.

that she be sentenced first on the two D felonies fell below the level of care, diligence, and skill that a reasonably competent attorney would employ in similar circumstances (L.F. 123). Had counsel objected at the time the court began pronouncing sentence on count I, the results of the plea agreement would have been different (L.F. 123).

Evidence offered in support of this claim at Sheryl's evidentiary hearing included the following:

Just prior to the guilty plea proceeding, Sheryl's nonbinding plea agreement was modified (Tr. 13). The original nonbinding agreement was that the State would recommend a sentence of 120 days, pursuant to Section 559.115 RSMo, on all five counts (Tr. 9-11). Defense counsel was unaware, up until moments before Sheryl's plea, that Sheryl was statutorily ineligible for the 120-day program on counts I, II, and III (Tr. 12-13, 37-38). When counsel learned of this problem, defense counsel and the State agreed to modify Sheryl's nonbinding agreement (Tr. 13). The modification included that sentencing would occur first on counts IV and V (Tr. 14). The State would recommend three-year sentences with the 120-day callback on those two counts (Tr. 9-10, 13). Sheryl would be brought back later for a second, subsequent sentencing on counts I, II, and III (Tr. 14). The State would then recommend probation with a back-up sentence of seventeen years imprisonment (Tr. 13, 14, 38-39, L.F. 19, 30, 30-31, 46-47, 106).

Sheryl and defense counsel testified at her evidentiary hearing that they both walked into the courtroom on the day of sentencing fully believing that Sheryl would be sentenced only on counts IV and V (Tr. 14-15, 38, 42, L.F. 106). During the entire

sentencing proceeding of January 11, 2000, Sheryl never understood that the court was considering the sentences for counts I, II, and III, which were the unclassified felonies of statutory sodomy and statutory rape (Tr. 42-43).

Despite the agreement that sentencing on counts I, II, and III would occur at a later date, the court nevertheless sentenced Sheryl on all five counts on January 11, 2000 (Tr. 14-15, L.F. 43, 102-103). Sheryl's attorney did not object when the court began sentencing Sheryl to counts I, II, and III (Tr. 15). Sheryl testified that had she known that the court would opt not to follow her agreement as to the order of sentencing and sentence her on all five counts at once, she would "never have pleaded guilty" and would have gone to trial (Tr. 51).

Claim Two

The second claim in Sheryl's amended motion was that plea counsel was ineffective for advising Sheryl to enter into a nonbinding plea agreement with the State (L.F. 123-124, 130-134). Because the plea agreement was "nonbinding," Sheryl waived her right to a trial, waived her right to withdraw her plea if she did not receive the 120-day incarceration she anticipated, and subjected herself to the entire range of punishment for all five of her felony offenses without gaining any benefit (L.F. 130-131). Sheryl argued that though the Missouri Court of Appeals has approved the use of nonbinding plea agreements, these agreements strip defendants of their rights to due process, to the effective assistance of counsel, and to a fair trial (L.F. 131). She described a nonbinding plea agreement as "nothing more than an illusory suggestion which misleads a defendant into believing that a benefit will be gained from pleading

guilty, when, in fact, the risks of a nonbinding plea agreement are equally as high as the risks in a jury trial" (L.F. 123).

Sheryl argued that competent counsel in similar circumstances would have advised her to persist in her pleas of not guilty rather than enter into a nonbinding plea offer (L.F. 123, 133). Sheryl stated that she was prejudiced by her attorney's advice to accept the State's plea offer because, as a result of counsel's advice, she forfeited her right to jury trial while gaining nothing - she was still exposed to the entire range of punishment on all of the offenses (L.F. 123, 133). Sheryl argued that had defense counsel not ineffectively advised her to enter into a nonbinding agreement with the State, the results of her guilty plea would have been different (L.F. 133).

Evidence offered in support of Sheryl's second claim included the following: Sheryl's mother, her brother, and Sheryl each testified that Sheryl's attorney advised them that he "felt very comfortable" that the plea agreement for sentencing to the 120-day callback on counts IV and V and probation on counts I, II, and III would be followed (Tr. 31, 36-37, 38-39, 41, Mov. Ex. 1, p. 8). Sheryl's attorney never expressed any concern and never warned Sheryl or her family of the very real possibility that the court could sentence Sheryl to a lengthy prison term such as twenty years imprisonment (Tr. 31, 36-37, 39, 41, Mov. Ex. 1, p. 8). On cross-examination, Sheryl agreed that her attorney told her that the State's recommendation was not binding upon the court, and that if the court did not follow the plea agreement, she would not be permitted to withdraw her pleas of guilty (Tr. 53, 56, 58).

Defense counsel testified similarly that he told Sheryl that the "most likely outcome" would be that Sheryl would receive the 120-day callback and that he "regarded it as unlikely that the court would give her a twenty-year sentence" (Tr. 12). Although he had never had a case before Judge Moentmann prior to this case, he advised Sheryl that the court would likely follow the plea agreement, because: he believed the 120-day callback was a reasonable disposition of this case; he believed a twenty-year sentence was "unreasonable;" Sheryl had never been in trouble before and had a clean record; recommendations from the State are persuasive to courts; and Sheryl was remorseful for committing the charged offenses (Tr. 23, 24). On cross-examination, Sheryl's attorney testified that he did not guarantee Sheryl that she "was going to get exactly what she wanted" (Tr. 25-26).

Sheryl's attorney testified further that had believed that there was a reasonable possibility that Sheryl would receive a lengthy prison sentence, he would have advised her to reject the plea agreement (Tr. 24-25). Sheryl testified that had she known that there was a fair possibility that the court would in fact sentence her to a lengthy prison term, such as twenty years imprisonment, she would not have pled guilty but would have taken her chances at a trial (Tr. 39-41).

Judge Moentmann issued findings of fact and conclusions of law denying Sheryl's claims for postconviction relief on February 27, 2001 (L.F. 174-182). In finding defense counsel effective, the court found that Sheryl knowingly and voluntarily entered into a nonbinding plea agreement with "full and complete awareness that the State would recommend that the Court utilize the 120 day rule and

that such recommendation could not bind the Court . . .." (L.F. 178-179). The court held that Sheryl's claims of ineffective assistance of counsel were totally without substance or merit (L.F. 180), and that Sheryl "totally failed to establish any and all of the allegation [sic] of her Motion, as Amended, and as Supplemented" (L.F. 181).

Notice of Appeal was timely filed on April 2, 2001 (L.F. 185-186). On appeal to the Missouri Court of Appeals, Western District, Sheryl claimed that defense counsel was ineffective for failing to sufficiently advise her of the risks of pleading guilty pursuant to a nonbinding plea agreement. The court found this claim without merit.

Sheryl applied for transfer to this Court, stating: "The Court of Appeals' opinion creates a question of general interest and importance as to whether an attorney is ineffective for advising a criminal defendant to enter into a nonbinding plea agreement where a defendant gains no benefit from such an agreement in exchange for the sacrifice of his or her right to a trial in that a nonbinding plea agreement, though it may enumerate certain terms, provides no guarantee that those terms will be followed.

On October 22, 2002, this Court sustained Sheryl's application for transfer. This appeal follows.

POINT I

The motion court clearly erred in denying Appellant's Rule 24.035 motion, because defense counsel was ineffective for advising Appellant to enter into a nonbinding plea agreement with the State, in violation of her rights to due process and to the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that a reasonably competent attorney would not advise a criminal defendant to enter into such an agreement because nonbinding plea agreements: 1) provide no benefits in exchange for a defendant's sacrifice of his or her right to a trial, 2) strip defendants of the right to withdraw their plea if the agreement is not followed, and 3) render defendants' pleas unknowing, unintelligent and involuntary by enumerating certain sentence terms, thus creating the illusion, yet no guarantee, that those terms will be followed. Appellant was prejudiced by counsel's ineffective assistance because but for counsel's advice, she would not have pled guilty and would have insisted on a trial.

Harrison v. State, 903 S.W.2d 206 (Mo. App. 1995);

Schellert v. State, 569 S.W.2d 735 (Mo. banc 1978);

U.S. Const. Amends. V, VI, XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

Missouri Supreme Court Rule 24.02; and

Missouri Supreme Court Rule 24.035.

POINT II

The motion court clearly erred in denying Appellant's Rule 24.035 motion, because the record leaves the firm impression that a mistake has been made, in that Appellant established that the court altered the terms of her plea agreement without affording her the opportunity to withdraw her pleas and that defense counsel failed to timely object to the court's action, in violation of Appellant's rights to due process and the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because a provision of Appellant's plea agreement was that she be sentenced first on counts IV and V only, and that she be sentenced on counts I, II, and III at a second, subsequent sentencing hearing. Appellant was not advised by the court that this aspect of her agreement was not binding on the court. Appellant was prejudiced by the court's alteration of her agreement and by counsel's failure to object to such because a key aspect of her nonbinding plea agreement was that the parties would revisit the issue of the State's recommendations on the unclassified felonies charged in counts I, II, and III if the court did not follow the State's recommendation on the two D felonies charged in counts IV and V. By sentencing Appellant on counts I, II, III, IV, and V on the same day, the court altered the terms of the plea agreement without providing Appellant an opportunity to withdraw her pleas, rendering Appellant's pleas of guilty involuntary and unknowing.

Good v. State, 979 S.W.2d 196 (Mo. App. 1998);

Harrison v. State, 903 S.W.2d 206 (Mo. App. 1995);

Schellert v. State, 569 S.W.2d 735 (Mo. banc 1978);

U.S. Const. Amends. V, VI, XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

Missouri Supreme Court Rule 24.02; and

Missouri Supreme Court Rule 24.035.

ARGUMENT I

The motion court clearly erred in denying Appellant's Rule 24.035 motion, because defense counsel was ineffective for advising Appellant to enter into a nonbinding plea agreement with the State, in violation of her rights to due process and to the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that a reasonably competent attorney would not advise a criminal defendant to enter into such an agreement because nonbinding plea agreements: 1) provide no benefits in exchange for a defendant's sacrifice of his or her right to a trial, 2) strip defendants of the right to withdraw their plea if the agreement is not followed, and 3) render defendants' pleas unknowing, unintelligent and involuntary by enumerating certain sentence terms, thus creating the illusion, yet no guarantee, that those terms will be followed. Appellant was prejudiced by counsel's ineffective assistance because but for counsel's advice, she would not have pled guilty and would have insisted on a trial.

Standard of Review

Appellate review of the denial of a postconviction motion is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Rule 24.035(k); *Boyd v. State*, 10 S.W.3d 579, 600 (Mo. App. 2000). Findings and conclusions are deemed erroneous if, after reviewing the record, this

Court is left with the firm impression a mistake has been made. *Saffold v. State*, 982 S.W.2d 749, 752 (Mo. App. 1998).

Discussion

Plea Agreements in General

The U.S. Supreme Court has recognized that the disposition of criminal charges by agreement between the State and the accused is an essential component of the administration of justice and is highly desirable for many reasons. *See Santobello v. New York*, 404 U.S. 257, 260-261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971). If every criminal charge were subjected to a full scale trial, every state and the federal government would need to multiply by many times the numbers of judges, courtrooms, detention facilities, prosecutors and public defenders currently paid for by taxpayers to enforce criminal laws and protect citizens' rights. *See Id*. Plea agreements allow for fair and relatively swift disposition of criminal cases, and thus have become accepted by the courts as "a legitimate and respectable adjunct of the administration of the criminal laws." *Schellert v. State*, 569 S.W.2d 735, 738 (Mo. banc 1978), quoting *State v. Thomas*, 61 N.J. 314, 321, 294 A.2d 57, 61 (1972).

A plea agreement is any agreement between the State and a defendant as to the sentence that will be imposed upon the defendant's plea of guilty. Plea agreements take many forms. Some plea agreements consist of specific sentence concessions by

the State. For example, in exchange for a defendant's plea of guilty to a C felony,[7] the State may agree to recommend a sentence of three years imprisonment. If the parties enter into this agreement, the State gains the benefit of avoiding a trial; the defendant gains the benefit of a certain three year sentence and avoids the risk of up to seven years imprisonment.

Another plea agreement might contain a more general sentence concession, such as an agreement whereby the State concedes that it will recommend no more than a certain number of years of imprisonment, a number which is less than the maximum sentence allowable by law. This type of agreement is commonly known as an agreement for a "cap" or a "lid" on the sentence.

An example of a plea agreement to a "cap" or a "lid" would be a situation where a defendant is charged with a B felony,[8] and the State offers to recommend no more than ten years imprisonment in exchange for the defendant's plea. If the defendant accepts this offer, the State gains the benefit of avoiding the effort of proving the defendant's guilt beyond a reasonable doubt before a judge or jury, and the defendant gains the benefit of knowing that the maximum punishment he will face is ten years, rather than the fifteen years he would face if he went to trial. Also, both the

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[7] The applicable range of punishment for a C felony is, in part, up to seven years imprisonment. Section 558.011 RSMo.

[8] The applicable range of punishment for a B felony is, in part, a minimum of five and a maximum of fifteen years imprisonment. Section 558.011 RSMo.

defense and the State may have the opportunity to argue to the court what sentence they feel is appropriate – whether it be probation or ten years imprisonment.

Some plea agreements may not even include a provision regarding the defendant's sentence. The agreement may be that the State will stand silent at sentencing and make no recommendation whatsoever to the court. Or, the agreement may be that the State will not prove the defendant to be a prior and persistent offender, thus subjecting the defendant to the standard range of punishment rather than the enhanced, longer sentences provided for in Section 558.016 RSMo.

Of course, defendants are not entitled to plea offers from the State. No Missouri statute, rule, or case requires prosecutors to tender a plea offer to a defendant to encourage disposition of the case without trial. The decision to make a plea offer is entirely a matter of prosecutorial discretion. A prosecutor may decide not to make a plea offer because he or she believes that a defendant deserves the maximum penalty for his crime. Or, a prosecutor may decide to make no plea offer in order to avoid public perception that he or she is soft on crime or unwilling to fully prosecute cases.

Also, a court is never obligated to accept a plea agreement reached by the prosecution and defense. *Santobello*, 404 U.S. at 262, 92 S.Ct. at 498-499; *State v. Hall*, 955 S.W.2d 198, 202 (Mo. banc 1997). A court may reject any plea agreement in any case. A court may reject multiple plea agreements reached in a single case and prompt a trial or an "open plea," that is, a guilty plea without any agreement at all between the parties. Because of judicial discretion to accept or reject any plea agreement, ultimately, no plea agreement is binding on a court. However, as stated

earlier, plea agreements are an essential element of the criminal justice process and courts look favorably on disposing of the majority of criminal cases via guilty plea. *See Schellert*, 569 S.W.2d at 737 (noting that "[i]t is commonly estimated that at least ninety percent of all criminal convictions are by pleas of guilty").

Schellert v. State

When a criminal case is to be disposed of pursuant to a plea agreement, certain protections must accompany the process so that the reasonable expectations of all parties involved are not disappointed. *See Schellert* 569 S.W.2d at 739. In Missouri, this Court designed the following procedure to ensure fairness in the process of a court's acceptance of a guilty plea made pursuant to a plea agreement:

When a defendant appears before the court to enter a guilty plea, the State makes the agreed-upon sentence recommendation to the court. The court, which is bound only by the range of punishment defined by statute, makes a decision whether to accept or reject the sentencing terms the State has agreed upon with the defendant. If the court decides not to follow the State's recommended sentence, it is rejecting the plea agreement. When a court rejects a plea agreement, it must allow a defendant the opportunity to withdraw his or her guilty plea. *Schellert*, 569 S.W.2d. at 737; Rule 24.02(d).

This Court first enunciated this process in *Schellert v. State*, and then formalized its decision in Rule 24.02(d). In *Schellert*, this Court granted transfer to consider whether, as a matter of substantial fairness, a trial court should afford a criminal defendant the opportunity to withdraw his or her plea of guilty in any case in

which the judge decides not to grant the sentence concessions contemplated by a plea agreement. 569 S.W.2d at 737.

Mr. Schellert pled guilty to writing a bad check for over $100.00 pursuant to a plea agreement that the State would recommend a sentence of probation. *Id*. at 736. During the guilty plea hearing, the court advised Mr. Schellert that the State's recommendation was "nothing more than that" and that the court had the authority to impose a different punishment. *Id*. When Mr. Schellert appeared for sentencing, the court sentenced him to five years in prison, the maximum sentence for his crime. *Id*. The court never informed Mr. Schellert that it intended to deviate from the State's recommendation of probation and never afforded him an opportunity to withdraw his guilty plea. *Id*.

This Court found it a matter of fundamental fairness that a defendant be allowed to withdraw his plea if he was not going to receive the benefit of his plea agreement. 569 S.W.2d at 737-739. This Court stated: "'[f]or a system of criminal justice strongly to encourage a defendant to believe that a certain sentence will follow the abandonment of his constitutional rights and yet to impose an entirely different sentence seems manifestly unfair.'" *Id*. at 738 (quoting Altschuler, The Trial Judge's Role in Plea Bargaining, Part I, 76 Colum.L.Rev. 1059, 1069 (1976)).

This Court noted that "a criminal defendant obviously makes a choice when he agrees (acting alone or through or with his attorney) in a bargain with the prosecutor to plead guilty and waive the full panoply of non-jurisdictional constitutional rights." *Id*. In finding that there should be no risks involved in pleading guilty pursuant to a plea

agreement, this Court stated "it is the very risk of uncertainty before a jury which the defendant seeks to avoid in striking an agreement with the prosecutor. If the risk were the same, he would be foolish to waive his right to a trial in exchange for the prosecutor's recommendation as to sentence or disposition." *Id*.

Thus, under *Schellert* and Rule 24.02(d), a plea court may not deviate from a plea agreement without providing a defendant an opportunity to withdraw his guilty plea. This law serves to protect defendants and to facilitate the disposition of cases by plea, rather than trial, because this law ensures that there will be no surprises for any party when a defendant appears before a judge and enters a plea of guilty.

Harrison v. State

Some Missouri jurisdictions have allowed guilty pleas pursuant to a type of agreement not contemplated by *Schellert*, known as "nonbinding recommendations" or "nonbinding agreements." These "nonbinding" agreements circumvent the procedures established by this Court in *Schellert* and Rule 24.02 - procedures which were designed to ensure fairness to all parties in plea proceedings. *See Schellert*, 569 S.W.2d at 739 (noting that "[i]f plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of either," quoting *Thomas*, 61 N.J. at 321, 294 A.2d at 61).

In jurisdictions with nonbinding agreements, a defendant is not guaranteed to receive the benefit of his or her agreement with the State. Instead, the defendant is advised of two things prior to the acceptance of his or her plea: 1) that the agreement is not binding on the court; and 2) that he or she will not have the opportunity to

withdraw the plea if the agreement is not followed. *See Harrison v. State*, 903 S.W.2d 206, 208-211 (Mo. App. 1995); s*ee also Good v. State*, 979 S.W.2d 196, 200 (Mo. App. 1998). If these warnings are given, a court can accept a defendant's guilty plea, sentence the defendant to anything within the statutory range of punishment (despite what is contemplated in the plea agreement) and not allow the defendant to withdraw the plea. *Harrison*, 903 S.W.2d at 210-211.

The phenomenon of "nonbinding" agreements flies in the face of this Court's decision in *Schellert*, which is premised on concepts of fundamental fairness and the ease and finality of disposing of criminal cases by plea.

Nonbinding plea agreements serve to confuse and mislead defendants by creating the perception, on the part of the defendant, that because the State is making a recommendation which the defendant has previously been advised of and agreed to, the defendant has an advantage when he or she approaches the bench to enter a plea of guilty. In fact, a defendant who appears before a judge and enters a plea of guilty pursuant to a "nonbinding recommendation" exposes himself or herself to the full range of punishment allowed by law and is in no better position than if the case went to trial.

Harrison v. State was the first appellate court decision to address the occurrence of nonbinding agreements in some Missouri courtrooms. 903 S.W.2d

206.[9] In *Harrison*, the parties negotiated a plea agreement under which Ms. Harrison agreed to plead guilty to five counts of forgery and one count of attempted theft. *Id*. at 207. The State agreed to dismiss Ms. Harrison's remaining fourteen counts and make a "nonbinding recommendation" that her sentences be served concurrently.[10] *Id*. During her guilty plea, Ms. Harrison acknowledged that the court could sentence her to either concurrent or consecutive sentences. *Id*. at 208. The court made sure Ms. Harrison understood that if the court imposed consecutive sentences, she would not be permitted to withdraw her plea. *Id*.

Ms. Harrison absconded before her sentencing hearing and was later picked up on a warrant. *Id*. at 207. The State stood by its prior recommendation for concurrent sentences, but added a recommendation that Ms. Harrison receive the maximum sentence on all six counts due to her flight from the state.[11] *Id*. The court sentenced

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[9] Subsequent Missouri cases clarifying the distinction between binding or "true" plea agreements and nonbinding plea agreements are: *Good, supra*; *Stufflebean v. State*, 986 S.W.2d 189 (Mo. App. 1999); *Simpson v. State*, 990 S.W.2d 693 (Mo. App. 1999); *Boyd, supra*; *Comstock v. State*, 68 S.W.3d 561 (Mo. App. 2001).

[10] The maximum term of imprisonment for forgery was seven years. Section 570.090 RSMo. The maximum term of imprisonment for attempted theft was five years. Sections 570.030 and 564.011 RSMo.

[11] If the maximum term of imprisonment on each count was imposed, with all six counts run concurrently with each other, the sentence would be seven years in prison.

Ms. Harrison to six consecutive five-year terms of imprisonment, for a total of thirty years in prison. *Id*. at 206-207. The court did not give Ms. Harrison an opportunity to withdraw her plea. *Id*.

In her postconviction motion and appeal, Ms. Harrison argued that the court deviated from her plea agreement without affording her an opportunity to withdraw her guilty pleas. *Id.* The Court of Appeals found that no such deviation occurred because Ms. Harrison did not have a "true plea agreement" with the State. *Id*. at 210-211. The court held that a difference between a "true plea agreement" and a "nonbinding recommendation" turns on whether the agreement includes a genuine sentence concession. *Id*. at 208. The court found no genuine sentence concession in *Harrison's* agreement because the agreement clearly stated that the State's recommendation was not binding on the court. *Id*. at 210-211.

The Court of Appeals noted that the plea court "made sure that it was clear what was understood by the term 'non-binding,'" and that Ms. Harrison also understood that she would not be allowed to withdraw her plea. *Id*. at 208, 210. Because of these measures, the Court of Appeals found *Harrison* distinguishable from *Schellert*. *Id*. at 210. The *Harrison* court speculated that had the defendant in *Schellert* been specifically advised that the State's recommendation was nonbinding and that he would not be able to withdraw his plea, the results of *Schellert* would have been different. *Id*. at 208.

Under *Harrison* and its progeny, when a defendant pleads guilty pursuant to a nonbinding recommendation from the State, the defendant must be specifically

advised that 1) the State's recommendation is nonbinding, and 2) the defendant will not have the opportunity to withdraw the plea if the court does not follow that recommendation. *Id*. at 210-211; *Good*, 979 S.W.2d at 200 (a knowing and voluntary plea pursuant to a nonbinding agreement requires that the defendant understand that the judge is not bound to follow the State's recommendation and whether his or her plea may be withdrawn if the judge declines to follow the recommendation); *Simpson*, 990 S.W.2d at 696-697 (where a plea agreement has a provision that the recommendation is nonbinding that provision must have been clearly explained); *Comstock*, 68 S.W.3d at 562-565 (where defendant was advised on guilty plea form and at sentencing hearing that he would not be allowed to withdraw his guilty plea if the court did not follow the State's recommendation, the record makes clear that defendant understood that the State's recommendation was not binding on the trial court); *Stufflebean*, 986 S.W.2d at 193-194 (the better practice in nonbinding plea agreements is for the trial court, before accepting a guilty plea, to specifically advise the defendant that he will not be permitted to withdraw his plea).

Not every jurisdiction in Missouri allows nonbinding plea agreements. To facilitate this Court's understanding of the role of nonbinding plea agreements in Missouri courts, undersigned counsel collected information from public defenders

throughout the state regarding which jurisdictions accept nonbinding plea agreements and which do not.[12] This information is attached to this brief as an appendix.[13]

The evolution of nonbinding plea agreements in some Missouri courtrooms has obfuscated, maligned, and damaged the clear and fair parameters of plea bargain agreements contemplated by *Schellert*. These agreements serve only to mislead defendants into believing that they have, by entering into a "nonbinding" agreement, improved their chances for a lesser sentence. In fact, defendants who enter into "nonbinding" agreements face the same consequences they would face if they persisted in their pleas of not guilty and proceeded to trial. A defendant gains no advantage by agreeing to plead guilty pursuant to such an agreement; to the contrary, such agreements penalize defendants by giving them the false illusion that their agreement will provide some protection from a harsh, unexpected punishment at sentencing.

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[12] This information represents the practice in Missouri courts on or about October 30, 2002, the date of counsel's inquiry to district public defenders throughout the state.

[13] Though this data is not part of the record, this information is highly relevant to the issues raised in Sheryl's case and counsel, as an officer of the court, vouches for its authenticity. This information is included as an appendix pursuant to Rule 84.04(h), allowing the use of an appendix for to set forth "other pertinent authorities" which are pertinent to the issues discussed in the brief.

Despite the clear standards of fairness required by this Court under *Schellert*, the Court of Appeals sanctioned a new breed of plea agreements in *Harrison* and its progeny. Like Mr. Schellert, Ms. Harrison was advised that the State's recommendation (for concurrent sentences) was merely a recommendation. *Harrison*, 903 S.W.2d at 208. However, Ms. Harrison was also advised, in advance, that she would not be allowed to withdraw her plea if the court did not follow the State's recommendation. *Id*. This, the *Harrison* court decided, gave Ms. Harrison fair warning that her agreement might or might not be followed, but that she would be stuck with her guilty plea even if her expectation of concurrent sentences was disappointed. The court stated "[h]ere, we see no issue of 'substantial fairness.'" *Id*. at 210.

The rationale of *Harrison* is wrong and clearly deviates from this Court's ruling in *Schellert*. As this Court found in *Schellert*, it is manifestly unjust for a criminal justice system to strongly encourage a defendant to believe that a certain sentence will follow the abandonment of his or her constitutional rights and then allow the imposition of an entirely different sentence. 569 S.W.2d at 738. This Court should, in the interest of fundamental fairness, overrule *Harrison* and restore *Schellert* as the standard for all plea agreements – where a court rejects a plea agreement, a defendant shall have the opportunity to withdraw the plea.

Sheryl's Case

On the advice of her attorney, Sheryl entered into the type of nonbinding plea agreement described in *Harrison v. State*. The specific terms of her agreement were as

follows: in exchange for her pleas of guilty to count I, statutory sodomy, count II, statutory rape, count III, statutory sodomy, count IV, endangering the welfare of a child, and count V, endangering the welfare of a child, sentencing would occur first on counts IV and V only, and the State's recommendation on those counts would be three years imprisonment, with sentencing to the 120-day callback program pursuant to Section 559.115 RSMo (L.F. 30-31, 46-47). Sheryl would later appear for a second sentencing hearing on counts I, II, and III (L.F. 46-47, 106). If the court sentenced Sheryl to 120 days on counts IV and V at the first sentencing, the State would recommend, at Sheryl's second sentencing, that she be given probation on counts I, II, and III, with a suspended seventeen year sentence on each count (L.F. 30-31, 46-47, 106).

During her guilty plea hearing, Sheryl was questioned on the record by defense counsel about whether she understood that her plea agreement was not binding on the court (L.F 31). Sheryl answered that yes, she understood that the plea agreement was not binding on the court and yes, she knew she would not be allowed to withdraw her plea if the court did not follow the agreement (L.F. 31). Thus, Sheryl was given the warnings that *Harrison* requires in order for a nonbinding plea to be upheld. *Harrison*, 903 S.W.2d at 210-211; *See also Good*, 979 S.W.2d at 200.

When Sheryl appeared for sentencing, the court asked the parties to state the plea agreement (L.F. 46). The prosecutor described it as follows:

> Your Honor, the State agreed to recommend the sentence of three years on each of the two class D felonies, and that those sentences run

concurrently, and that she be committed and serve those under the 120-day rule with the Court reserving jurisdiction under Section 559.115.

In addition, that if the Court does that, she – if the Court does recall her or whatever happens – she would eventually be sentenced to 17 years consecutive for the statutory rape and . . . the statutory sodomy charges**.**

We also agreed that they could argue for probation, or whatever the Court desired to do with respect to all of it and not use the 120; but the recommendation of the State is to use the 120.

(L.F. 46-47). After this recitation of the plea agreement, the parties clarified the agreement upon the court's inquiry:

Court: Okay. The State would be recommending a straight probation then on the longer if the 120?

Defense: Yes, it is.

Court: Is that the agreement?

State: Assuming the Court calls her back; yes, sir, that would be the agreement.

Court: Okay.

(L.F. 47). The court then questioned Sheryl about her understanding of the nonbinding plea agreement as follows:

Court: Okay. Mrs. Haake, do you understand that that was going to be the recommendation of the prosecuting attorney's office?

Sheryl: [Nods head.]

Court: You need to answer verbally.

Sheryl: Yes.

Court: Do you understand that's only a recommendation?

Sheryl: Yes.

Court: Do you understand that the Court is not bound by that recommendation?

Sheryl: [Nods head.]

Court: Verbally, please.

Sheryl: Yes.

Court: Do you understand that the court could impose a sentence greater than or less than what was recommended by the prosecuting attorney?

Sheryl: Yes.

Court: Do you further understand that if the Court did not follow the recommendation, you would not be allowed to withdraw your plea of guilty?

Sheryl: Yes.

(L.F. 47-48). The court sentenced Sheryl to concurrent terms of seventeen years imprisonment on counts I, II, and III, and concurrent terms of three years imprisonment on counts IV and V, and ran the sentences of counts IV and V consecutive to counts I, II, and III, for a total of twenty years imprisonment (L.F. 102-103).

Sheryl, who had reasonably anticipated that she would serve 120 days in prison and then be released to probation, instead went to prison for twenty years.

Upon her delivery in the Department of Corrections, Sheryl filed a *pro se* motion for postconviction relief which was amended by appointed counsel (L.F. 109-115, 121-137). Counsel raised the claim that "defense counsel [was] ineffective for advising Movant to enter into a nonbinding plea agreement with the State" (L.F. 123). The motion argued that: "[w]hile the Western District Court of Appeals has approved the use of nonbinding plea agreements, these agreements strip defendants of their rights to due process, to the effective assistance of counsel, and to a fair trial" (L.F. 131). Counsel argued that:

> Competent counsel in similar circumstances would have advised Movant to persist in her pleas of not guilty rather than enter into a non-binding plea offer . . .. Movant was prejudiced by her attorney's advice to accept the State's plea offer because, as a result of counsel's advice, she forfeited her right to a jury trial while gaining nothing – she was still exposed to the entire range of punishment on all of the offenses.

(L.F. 133). The motion court granted an evidentiary hearing, and evidence was heard from defense counsel, Sheryl, and Sheryl's family members (Tr. 2-59, Mov. Ex. 1).

Defense counsel testified that he advised Sheryl to enter into a nonbinding plea agreement with the State (Tr. 11, 13-14, 24-25). He told Sheryl he believed the most likely outcome of her case would be that she would receive the 120-day callback (Tr. 12). He regarded it as unlikely that the court would give her a lengthy sentence such as twenty years (Tr. 12). Counsel testified that had he believed that Sheryl would receive a substantial prison sentence, he would have advised her to go to a jury trial,

stating: “I have tried cases before simply on the issue of punishment, conceding guilt” (Tr. 24-25).

Sheryl testified that defense counsel advised her to enter into a nonbinding plea agreement with the State (Tr. 36-37, 41, 59). Counsel explained to Sheryl and her family that the court did not have to go along with the State’s recommendation, but that “ninety-nine percent of the time” courts follow what the State recommends (Tr. 36). Counsel never seemed to be concerned that there would be any reason for the court not to follow the recommendation in her case (Tr. 36).

Sheryl testified that counsel advised that if she entered into the plea, the best-case scenario would be that she would walk out with probation, and the worst-case scenario would be that she would be away from her children for the 120 days (Tr. 37). She testified that counsel never indicated that she might get a lengthy prison sentence, such as twenty years, and that by contrast: “the most time he ever, ever discussed with me serving in prison was the 120-day callback” (Tr. 39). Had counsel advised her that there was a fair possibility that the court would not follow the State’s recommendation, Sheryl would never have pled guilty, but would have gone to a jury trial (Tr. 41).

Sheryl testified that she understood that, under the law, the court did not have to follow the State’s recommendation (Tr. 41). However, she persisted in her plea because defense counsel never seemed concerned that the court wouldn’t follow the State’s recommendation (Tr. 41). She stated: “he never gave me any indication that they wouldn’t take the plea, or that they would not give me the 120-days; therefore, I didn’t go to a jury trial. I went with his recommendation of taking the plea” (Tr. 41).

The motion court ruled that defense counsel provided effective assistance of counsel (L.F. 178), that Sheryl was fully aware that the court need not follow the sentence recommendations of the State and that she would not be permitted to withdraw her plea (L.F. 177-178), that Sheryl received "the full and complete benefit of the plea agreement" (L.F. 179), and that Sheryl "has totally failed to establish any and all of the allegation [sic] of her Motion, as Amended, and as Supplemented" (L.F. 181).

The findings of the motion court are clearly erroneous. Sheryl entered into a nonbinding plea agreement upon the advice of her attorney (Tr. 36-37, 41, 59). Based on her conversations with defense counsel, Sheryl believed the State's recommendation would be followed (36-37, 39, 41), and her belief was reasonable. Defense counsel gave Sheryl no indication that there was any cause to worry that the State's recommendation, which was for 120 days imprisonment with a three year back-up sentence on counts IV and V, and straight probation with a seventeen year back-up sentence on counts I, II, and III, would not be followed (Tr. 39, 41). If Sheryl had any idea that she would receive a lengthy prison sentence, she would not have pled guilty and would have instead insisted on a trial (Tr. 41).

Counsel's advice that Sheryl enter into a nonbinding plea agreement fell below the customary level of skill, care and diligence that a reasonably competent attorney would exercise in similar circumstances. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's ineffective advice, including his failure to indicate that there was a possibility that Sheryl would receive a lengthy

prison sentence, rendered Sheryl's plea involuntary and unknowing. *See Rick v. State*, 934 S.W.2d 601, 605 (Mo. App. 1996) (after a guilty plea, a claim of ineffective assistance of counsel is relevant only to the extent it affected the voluntariness and understanding with which the plea was made).

Sheryl reasonably believed, based on defense counsel's advice to accept the State's nonbinding plea offer, his lack of concern about a lengthy sentence, and his failure to counsel her on the possibility of receiving a lengthy sentence, that the court would impose the sentences recommended by the state. *See Hampton v. State*, 877 S.W.2d 250, 252 (Mo. App. 1994) (when a defendant claims his guilty plea was involuntary because he was misled by counsel, the test is whether the defendant's belief was reasonable). Had counsel advised Sheryl that it was possible that the court would impose a lengthy prison sentence, the results of this plea would have been different. Sheryl was prejudiced by counsel's ineffective assistance because but for counsel's advice to enter into a nonbinding plea agreement and his failure to advise her that, with a nonbinding agreement, she could receive a lengthy prison sentence, Sheryl would not have pled guilty but would have insisted on a trial (Tr. 41). *See State v. Roll*, 942 S.W.2d 370, 375 (Mo. banc 1997) (in order to show prejudice in a guilty plea case, a defendant must prove that, but for the errors of counsel, he would not have pled guilty and would have demanded a trial).

It is true that Sheryl was given the warnings required by *Harrison* for nonbinding plea agreements. She was warned that the State's recommendation was not binding on the court and that she would not be allowed to withdraw her plea.

However, *Harrison* is bad law. It should not control Sheryl's case. The nonbinding agreements sanctioned in *Harrison* circumvent the protections of fundamental fairness that this Court erected in *Schellert*. Nonbinding agreements mislead defendants such as Sheryl into believing that they are obtaining a benefit from their agreements in exchange for the abandonment of their constitutional right to a trial.

In *Harrison*, the Court of Appeals found that standards of fairness allow for nonbinding pleas so long as a defendant is advised, on the record, that the State's recommendation is nonbinding and that the defendant will not have the right to withdraw the plea. 903 S.W.2d at 210-211. The *Harrison* court's logic and its idea of fairness does not comport with human experience or common sense.

The courtroom is a mystery to many criminal defendants, especially first-time criminal defendants such as Sheryl Wyreck-Haake. The words that are spoken by the judge, the prosecutor, probation officers, and even a defendant's own attorney are new, foreign, and likely intimidating to a person called to court to answer the State's charge that he or she has committed a crime. Defendants rely heavily on their attorneys to interpret the maze of the criminal courtroom for them and to advocate on their behalf.

Pre-eminent in a defendant's mind is the sentence that will be imposed if he or she is convicted of the crime or crimes charged. For some, admitting guilt is appropriate and even appealing. However, the wide range of punishment for felony offenses is likely a deterrent for some defendants who might prefer to admit their

guilt.[14] Plea bargain agreements are an answer to this situation. In exchange for a defendant's guilty plea, some assurance is given, whether very specific or very general, as to the sentence that will be imposed.

In nonbinding agreements such as Sheryl's, the sentence terms agreed upon have no legal meaning. The court is not bound to follow the terms recited. *Id*. at 208-209. Although *Harrison* requires that defendants specifically be advised that the court is not bound by the plea recommendation, this measure does not safeguard the fairness of the proceeding. As this Court noted in *Schellert*: "[i]t 'is not unusual for an accused to be lulled into believing that the court proceedings are a mere formality, and that everyone involved is party to the promised bargain, upon which the plea is founded.'" *Schellert*, 569 S.W.2d at 738, quoting *Commonwealth v. Barrett*, 223 Pa.Super.163, 166, 299 A.2d 30, 31 (1972). Even when the warnings required by *Harrison* are stated on the record and in open court, a defendant such as Sheryl, appreciating the formality of the setting, may be lulled into believing that these words are only part of the drill and that some advantage will be gained by the State's recommendation.

The warnings required by *Harrison* do not ensure that a defendant truly understands the ramifications of a nonbinding plea; they only assure that a court

[14] Pursuant to Section 558.011 RSMo, the range of punishment for felony offenses, in terms of imprisonment in the Department of Corrections, is as follows: A felony: 10 to 30 years; B felony: 5 to 15 years; C felony: 1 to 7 years; D felony: 1 to 5 years.

communicates to the defendant that the State's recommendation is "nonbinding." Though a court understands the significance of a nonbinding agreement, it is a stretch of the imagination to believe that defendants truly understand the disadvantages of this type of agreement.

Defense counsel was ineffective for advising Sheryl to enter into a nonbinding plea agreement with the State. To prevail on an ineffective assistance of counsel claim, a movant must establish that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances and that he or she was prejudiced thereby. *Strickland*, 466 U.S. at 687. After a guilty plea, a claim of ineffective assistance of counsel is relevant only to the extent it affected the voluntariness and understanding with which the plea was made. *Rick*, 934 S.W.2d at 605. To show prejudice from alleged ineffective assistance of counsel in a guilty plea case, a defendant must prove that, but for the errors of counsel, he or she would not have pled guilty and would have demanded a trial. *Roll*, 942 S.W.2d at 375.

Defense counsel was ineffective for advising Sheryl to enter into a nonbinding plea agreement. Sheryl was provided no benefit from her agreement in exchange for the sacrifice of her right to a trial, and this agreement stripped Sheryl of her right, under *Schellert* and Rule 24.02(d), to withdraw her plea when the court did not follow the State's recommendation and impose the sentence she expected. Sheryl's plea was unknowing, unintelligent and involuntary because certain sentence terms were enumerated to her which created the illusion that she would be sentenced to 120 days incarceration when in fact she had no guarantee of what her sentence would be.

This Court described in *Schellert* the decision-making process a criminal defendant faces when choosing to plead guilty:

> A criminal defendant obviously makes a choice when he agrees (acting alone or through or with his attorney) in a bargain with the prosecutor to plead guilty and waive the full panoply of non-jurisdicitonal constitutional rights . . .. [I]t is the very risk of uncertainty before a jury which the defendant seeks to avoid in striking an agreement with the prosecutor. If the risk were the same, he would be foolish to waive his right to a trial in exchange for the prosecutor's recommendation as to sentence or disposition.

Schellert, 569 S.W.2d at 738. In nonbinding agreements, defendants merely gain the illusion that they are avoiding the risk of uncertainty they would face before a jury. In fact, a defendant faces the same risks and the same range of punishment with a nonbinding plea as he or she would face if the case went to trial. As stated in *Schellert*, a defendant would be foolish to waive his right to a trial if the risks of a plea agreement were the same as the risks of a trial. An attorney who advises a client to enter into such an agreement is more than foolish, he is ineffective.

Sheryl's guilty plea was rendered unknowing, unintelligent and involuntary by counsel's ineffective advice to enter into a nonbinding plea agreement. A primary tenet of a fair guilty plea is that it must be knowingly, intelligently, and voluntarily entered into by a criminal defendant. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Hunter*, 840 S.W.2d 850, 861 (Mo. banc 1992), cert.

denied 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 732 (1993), rehearing denied 510 U.S. 929, 114 S.Ct. 339, 126 L.Ed.2d 283 (1993) (holding that "a plea of guilty must not only be a voluntary expression of the defendant's choice, it must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences of the act," quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

A defendant's guilty plea may be rendered unknowing and unintelligent if the defendant does not fully understand all the terms of his or her plea agreement. *Good*, 979 S.W.2d at 200; *Hampton*, 877 S.W.2d at 252; s*ee also State v. Williams*, 361 S.W.2d 772, 775 (Mo. banc 1962) (where a defendant is induced to plead guilty by mistake, the defendant's plea is rendered unknowing, involuntary, and unintelligent).

It was impossible for Sheryl to fully understand all the terms of a nonbinding plea agreement. The fact that an agreement between the State and the defense has been reached naturally creates the mistaken belief on the part of a defendant that the court will abide by these terms, despite the court's admonitions that the recommendation is "nonbinding" and another sentence may be imposed.

As Sheryl testified, she understood that under the law the court did not have to follow the State's sentence recommendation (Tr. 41). However, she persisted in her plea because she was never given any indication that the court would not actually follow the State's recommendation (Tr. 36, 39, 41). When Sheryl decided to plead guilty, she was under the illusion that she had a plea agreement that would be followed, despite the admonitions of the court. Sheryl did not fully understand that the

court could do whatever it wanted, such as sentence her to twenty years imprisonment. Sheryl harbored a reasonable, mistaken belief that she would be sentenced to the 120 days recommended by the State. This mistaken belief rendered Sheryl's plea unknowing, involuntary and unintelligent.

Conclusion

Defense counsel was ineffective for advising Sheryl to enter into a nonbinding plea agreement with the State, in violation of her rights to due process and to the effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. A reasonably competent attorney in similar circumstances would not have advised Sheryl to enter into an agreement where she gained no benefit in exchange for her sacrificing her right to a trial, where she was stripped of her right to withdraw her plea if the State's recommendation was not followed, and where her plea was rendered unknowing by the illusory suggestion that the plea terms articulated by the State would be followed by the court. Sheryl reasonably relied, to her detriment, on her attorney's inaccurate and ineffective representations that the court would follow the State's sentence recommendations.

Sheryl respectfully requests that this Court overrule *Harrison*, find defense counsel ineffective for advising Sheryl to enter into a nonbinding plea agreement, reverse the decision of the motion court, vacate Sheryl's convictions and sentences, and remand the case for reinstatement on a trial docket.

ARGUMENT II

The motion court clearly erred in denying Appellant's Rule 24.035 motion, because the record leaves the firm impression that a mistake has been made, in that Appellant established that the court altered the terms of her plea agreement without affording her the opportunity to withdraw her pleas and that defense counsel failed to timely object to the court's action, in violation of Appellant's rights to due process and the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because a provision of Appellant's plea agreement was that she be sentenced first on counts IV and V only, and that she be sentenced on counts I, II, and III at a second, subsequent sentencing hearing. Appellant was not advised by the court that this aspect of her agreement was not binding on the court. Appellant was prejudiced by the court's alteration of her agreement and by counsel's failure to object to such because a key aspect of her nonbinding plea agreement was that the parties would revisit the issue of the State's recommendations on the unclassified felonies charged in counts I, II, and III if the court did not follow the State's recommendation on the two D felonies charged in counts IV and V. By sentencing Appellant on counts I, II, III, IV, and V on the same day, the court altered the terms of the plea agreement without providing Appellant an opportunity to withdraw her pleas, rendering Appellant's pleas of guilty involuntary and unknowing.

Standard of Review

Appellate review of the denial of a postconviction motion is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Rule 24.035(k); *Boyd v. State*, 10 S.W.3d 579, 600 (Mo. App. 2000). Findings and conclusions are deemed erroneous if, after reviewing the record, this Court is are left with the firm impression a mistake has been made. *Saffold v. State*, 982 S.W.2d 749, 752 (Mo. App. 1998).

Discussion

Sheryl entered into the following plea agreement with the State: Sheryl would plead guilty to five felony counts, counts I, II, and III, the unclassified offenses of statutory sodomy and statutory rape, and counts IV and V, the class D felonies of endangering the welfare of a child. Sentencing would occur first on counts IV and V, and the State would recommend concurrent sentences of three years imprisonment with the 120-day callback pursuant to Section 559.115 RSMo. Sentencing on counts I, II, and III, would occur later, and if the court followed the State's recommendation on counts IV and V, the State would recommend probation with concurrent back-up sentences of seventeen years imprisonment on counts I, II, and III (run consecutively to the three year back-up sentence on counts IV and V). If the court did not follow the State's recommendation of the 120-day callback program on counts IV and V, the State and the defense would further discuss the State's recommendation on counts I, II and III prior to Sheryl's sentencing on those counts **(**Tr. 13, 14, 38-39, L.F. 19, 30-31, 46-47, 106).

Sheryl pled guilty to counts I-V pursuant to this plea agreement (Tr. 14, 31, 38-39, L.F. 19, 25, 27-41, 46-47, 106). During the plea proceeding, Sheryl testified that she understood that the court did not have to follow the plea agreement, and that if the court did not follow the agreement, she would not have the opportunity to withdraw her pleas of guilty (L.F. 31). However, neither the court nor defense counsel specifically informed Sheryl during the plea proceeding that the part of the plea agreement whereby the parties agreed to delay sentencing as to counts I, II, and III, was not binding upon the court (L.F. 27-41).

On January 11, 2000, the court called the case for sentencing (L.F. 43, 45). Sheryl and her attorney walked into court that day fully believing that Sheryl would be sentenced only on counts IV and V, the two class D felonies (Tr. 14-15, 38, 42, L.F. 106). The court asked the parties to state the plea agreement, and the prosecutor stated as follows:

> Your Honor, the State agreed to recommend the sentence of three years on each of the two class D felonies, and that those sentences run concurrently, and that she be committed and serve those under the 120-day rule with the Court reserving jurisdiction under Section 559.115.
>
> In addition, that if the Court does that, she – if the Court does recall her or whatever happens – **she would eventually be sentenced to 17 years consecutive for the statutory rape and the statutory sodomy, and the statutory sodomy charges** [sic].

> We also agreed that they could argue for probation, or whatever the Court desired to do with respect to all of it and not use the 120; but the recommendation of the State is to use the 120.

(L.F. 46-47, emphasis added). Sheryl agreed that that was her understanding of the plea agreement (L.F. 47).

The court then questioned Sheryl about her understanding of the nonbinding plea agreement:

Court: Okay. Mrs. Haake, do you understand that that was going to be the recommendation of the prosecuting attorney's office?

Sheryl: [Nods head.]

Court: You need to answer verbally.

Sheryl: Yes.

Court: Do you understand that's only a recommendation?

Sheryl: Yes.

Court: Do you understand that the Court is not bound by that recommendation?

Sheryl: [Nods head.]

Court: Verbally, please.

Sheryl: Yes.

Court: Do you understand that the Court could impose a sentence greater than or less than what was recommended by the prosecuting attorney?

Sheryl: Yes.

Court: Do you further understand that if the Court did not follow that recommendation, you would not be allowed to withdraw your plea of guilty?

Sheryl: Yes.

(L.F. 47-48).

With respect to the nonbinding nature of her plea agreement, Sheryl was specifically informed that the court did not have to follow the recommendation of the prosecutor, that it could impose "a sentence greater or less than what was recommended," and that she would not be permitted to withdraw her plea (L.F. 48). However, Sheryl was not informed that the court was not bound to follow the aspect of the agreement that she be sentenced first on only counts IV and V, and that sentencing on counts I, II, and III would occur at a second, subsequent sentencing hearing (L.F. 45-107).

After hearing evidence and argument at sentencing, the parties discussed the State's recommendation of the 120-day callback (L.F. 95-96, 98). The only aspect of the plea agreement argued to the court during these final moments before judgment and sentence was pronounced was the issue of how the court would impose the 120-day sentence, that is, whether it would be served in the Missouri Department of Corrections or whether it would be served, incrementally, in the Ray County jail (L.F. 95-98). Therefore, the record reflects that the only sentences discussed at that time were the sentences on counts IV and V, the only counts for which Sheryl was eligible for the 120-day program.

The court sentenced Sheryl on counts I, II, III, IV and V as follows: concurrent terms of seventeen years imprisonment on counts I, II, and III, and concurrent terms of three years imprisonment on counts IV and V, with the sentences for counts IV and V running consecutively to counts I, II, and III – for a total of twenty years imprisonment (L.F. 102-103).

Defense counsel asked the court to state again "what the Court's sentence was" (L.F. 106). After the court restated the sentences, counsel stated, in part: "[a]s the Court will recall, it was the recommendation of the State that she be sentenced today only on counts IV and V, and that she be returned for a decision as to whether the sentence on the seventeen years." (L.F. 106). The court responded: "the Court has made its judgment" (L.F. 107).

Despite the agreement that sentencing on counts I, II, and III would occur at a later date, the court nevertheless sentenced Sheryl on all five counts on January 11, 2000 (Tr. 14-15, L.F. 43, 102-103). Defense counsel did not object when the court began sentencing Sheryl to counts I, II, and III.

The U.S. Supreme Court has ruled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1972). This Court has stated: "[i]f plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of

either." *Schellert v. State*, 569 S.W.2d 735, 739 (Mo. banc 1978), quoting *State v. Thomas*, 61 N.J. 314, 321, 294 A.2d 57, 61 (1972).

Under Missouri appellate court decisions, a defendant who enters into a nonbinding plea agreements cannot expect that the State's sentence recommendation will be followed or that he or she will have the opportunity to withdraw the plea so long as the sentencing court specifically advises, prior to accepting the plea: 1) that the State's sentence recommendation is not binding on the court; and 2) that the defendant will not have the opportunity to withdraw the plea if the recommendation is not followed. *See Harrison v. State*, 903 S.W.2d 206, 208 (Mo. App. 1995)[15]; s*ee also Good v. State*, 979 S.W.2d 196, 200 (Mo. App. 1998).

In *Harrison*, the Court of Appeals held that the distinction between "true" plea agreements and "nonbinding recommendations" is that no sentence concession is negotiated in "nonbinding recommendations." 903 S.W.2d at 208. Therefore, a defendant has no legitimate expectation as to a certain sentence. The *Harrison* court held that when a defendant pleads guilty pursuant to a nonbinding recommendation, a

[15] Sheryl contends that *Harrison* is bad law and should be overruled by this Court. However, in the event this Court does not overrule *Harrison*, Sheryl requests that this Court apply the principles enunciated in *Harrison* to her case and find that she was not adequately warned by the court that the plea agreement provision regarding the order of her sentencing was not binding on the court.

court does not have to allow the defendant the opportunity to withdraw the plea if the State's sentence recommendation is not followed. *Id*. at 210-11.

Here, Sheryl was advised by the court that the State's sentence recommendation was not binding, but she was not advised that the parties' agreement as to the order of her sentencing (counts IV and V before counts I, II and III) was not binding on the court. At Sheryl's sentencing hearing, the State recited its recommendation to the court that it "use the 120" (L.F. 46-47). The court questioned Sheryl, asking the following questions: "[d]o you understand that's only a recommendation? . . . Do you understand that the Court is not bound by that recommendation? . . . Do you understand that the Court could impose a sentence greater than or less than what was recommended by the prosecuting attorney?" (L.F. 47-48). Sheryl answered "yes" to each of these questions (L.F. 47-48).

The court did not ask Sheryl, at either her guilty plea hearing or at sentencing, if she understood that the court was free to sentence her that day to counts I-V, not just counts IV and V, as was contemplated by the plea agreement. The court's failure to adequately advise Sheryl that this provision of her plea agreement was nonbinding eliminated the court's discretion to deviate from that aspect of her agreement without affording her the opportunity to withdraw her pleas.

Under Rule 24.02 and *Schellert*, a court must allow a defendant the opportunity to withdraw his or her plea if the court rejects the plea agreement. *Schellert*, 569 S.W.2d at 737; Rule 24.02(d)(4). *Harrison* creates an exception to this rule in circumstances where defendants are warned that their agreement is not binding on the

court and that they will not have the opportunity to withdraw their plea. 903 S.W.2d at 208.

Here, the court rejected Sheryl's plea agreement by sentencing Sheryl to counts I-V at her initial sentencing hearing. The court had not advised Sheryl, prior to accepting her plea or prior to sentencing her, that it was not bound by the parties' agreement as to the order of sentencing. Thus, this aspect of the agreement was not enforceable as a provision that was not binding on the court. When the court rejected this provision as to order of sentencing, the court was obligated, under *Schellert* and Rule 24.02, to allow Sheryl the opportunity to withdraw her pleas. Defense counsel's failure to timely object to the court's sentencing Sheryl on counts I, II, and III, and to clarify for the court that she was to be sentenced first on counts IV and V, was ineffective.

To prevail on an ineffective assistance of counsel claim, a movant must establish that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances and that he or she was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). After a guilty plea, a claim of ineffective assistance of counsel is relevant only to the extent it affected the voluntariness and understanding with which the plea was made. *Rick v. State*, 934 S.W.2d 601, 605 (Mo. App. 1996). To show prejudice from alleged ineffective assistance of counsel in a guilty plea case, a defendant must prove that, but for the errors of counsel, he or she would not have

pled guilty and would have demanded a trial. *State v. Roll*, 942 S.W.2d 370, 375 (Mo. banc 1997).

A primary tenet of a fair guilty plea is that it must be knowingly, intelligently, and voluntarily entered into by a criminal defendant. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Hunter*, 840 S.W.2d 850, 861 (Mo. banc 1992), cert. denied 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 732 (1993), rehearing denied 510 U.S. 929, 114 S.Ct. 339, 126 L.Ed.2d 283 (1993) (holding that "a plea of guilty must not only be a voluntary expression of the defendant's choice, it must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences of the act," quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

A defendant's guilty plea may be rendered unknowing and unintelligent if the defendant does not fully understand all the terms of his or her plea agreement. *Good*, 979 S.W.2d at 200; *Hampton*, 877 S.W.2d 250, 252 (Mo. App. 1994); s*ee also State v. Williams*, 361 S.W.2d 772, 775 (Mo. banc 1962) (when a defendant is induced to plead guilty by mistake, the defendant's plea is rendered unknowing, involuntary, and unintelligent).

An aspect of Sheryl's plea agreement was that she be sentenced first on the two D felonies, then later on the three unclassified felonies (L.F. 31, 106, Tr. 13). This aspect of the agreement was crucial because the D felonies were the only counts for which Sheryl was eligible for the 120-day callback program (Tr. 12-13, 37-38). *See* Section 559.115.5 RSMo Cum. Supp. 1998. The agreement was that depending on the

court's sentences on the D felonies, the State would recommend probation on the three unclassified felonies (Tr. 13-14, 38-39, L.F. 19, 30-31, 46-47, 106). Implicit in this agreement was that if the court chose not to sentence Sheryl to the 120-day callback program, the State and the defense would have further discussions regarding the State's recommendations on counts I, II, and III (L.F. 46-47, 106, 123, Tr. 14, 38, 42). Although Sheryl pled guilty knowing that the State's recommendation as to the sentences imposed by the court was nonbinding, she was never advised that the court had the discretion to sentence her on all counts where she had been promised that she would first be sentenced on counts IV and V.

Defense counsel's failure to object when the court departed from the aspect of the agreement that Sheryl first be sentenced on the D felonies rendered her guilty plea unknowing, unintelligent, and involuntary, and stripped her of what little benefit she had to gain from this plea agreement. Defense counsel's failure to protect Sheryl's reasonable expectations that she be sentenced first on the two D felonies fell below the level of care, diligence, and skill that a reasonably competent attorney would employ in similar circumstances. Had counsel objected at the time the court began pronouncing sentence on count I, the results of the plea agreement would have been different (L.F. 123). The motion court denied this postconviction claim, stating as follows:

> The Court finds that the suggestion to delay sentencing upon Counts I, II, and III and to sentence only upon Counts IV, and V was a mere suggestion; was not an essential part of the plea agreement; that the

> Movant was fully aware of the nonbinding nature of the suggestion; and that the same was done merely to facilitate the Movant's opportunity to argue for probation or other forms of alternative sentencing at the Sentencing Hearing held on January 11, 2000.

(L.F. 177).

The motion court's finding is clearly erroneous and is unsupported by the record. The evidence adduced at the postconviction hearing established that: the delay in sentencing on counts I, II, and III, was an essential part of Sheryl's plea agreement because it allowed Sheryl the opportunity to renegotiate the State's recommendations on on counts I, II, and III - unclassified felonies with a range of punishment from five years to life imprisonment[16] - based on the court's sentence on the less serious class D felonies charged in counts IV and V (Tr. 13-15, 31, 38-39, 42, L.F. 19, 25, 30-31, 46-47, 106). Further, the record reflects that the prosecutor, like Sheryl and her attorney, also believed that the sentencing of January 11, 2000, was for the court to determine the appropriate sentences for counts IV and V only (Tr. 15, L.F. 46-47, 98, 106).

The particular circumstances of this case warrant relief for Sheryl. Her due process rights were violated by the court's alteration of her plea agreement without affording her the right to withdraw her plea and she was denied the effective assistance of counsel by defense counsel's failure to timely object and clarify for the court that

[16] Sections 566.032 and 566.062 RSMo.

she was to be sentenced first on counts IV and V, not on counts I, II, III, IV and V, when she appeared for sentencing on January 11, 2000.

In *Good v. State*, the Court of Appeals held that Ms. Good entered her guilty pleas unknowingly and unintelligently. 979 S.W.2d at 200. Ms. Good pled guilty pursuant to a nonbinding agreement that the State would recommend a sentence of twenty years imprisonment with a 120-day callback. *Id.* at 197. Prior to her plea, Ms. Good was given a guilty plea petition which stated that the State's recommendation was nonbinding and that she would not have the opportunity to withdraw her plea of guilty. *Id.* The court sentenced Ms. Good to twenty years imprisonment, declining to follow the prosecutor's request for the 120-day callback. *Id.* at 198. Defense counsel requested that Ms. Good be allowed to withdraw her plea, and the court denied that request. *Id.* In her postconviction case, Ms. Good asserted that the plea court failed to personally advise her that she could not withdraw the plea if the court failed to follow the State's recommendation for the 120-day callback. *Id.* at 199.

At the postconviction hearing, defense counsel testified that he advised Ms. Good that it was the state of the law that if her agreement was not honored, she could not withdraw her plea. *Id*. But, counsel also advised that if Ms. Good's plea agreement was not honored, she would be allowed to withdraw her plea. *Id*. The *Good* court found that "[i]n essence, [counsel] told her that, technically speaking, the questionnaire accurately reflected the law, but that the practice was to allow withdrawal of the plea." *Id.* The court found that there was no clarification at Ms. Good's guilty plea proceeding that she would not be permitted to withdraw her plea if

her agreement was not followed. *Id.* at 200. The *Good* court held that where counsel advised that the practice was to allow withdrawal of the plea, "we cannot say that Good's plea was knowingly and intelligently made." *Id.*

The Court of Appeals' decision in *Good* demonstrates how important it is that each individual defendant understand the court's obligations with respect to his or her nonbinding plea agreement. Here, Sheryl was advised that the court would not be bound by the State's sentence recommendation, but she was not advised that the court would not be bound by the agreed-upon order of sentencing. When the court deviated from the agreement that Sheryl be sentenced first on counts IV and V, the court should have allowed Sheryl the opportunity to withdraw her plea. Further, defense counsel should have timely objected and clarified for the court that Sheryl was to be sentenced only on counts IV and V. Counsel's failure to do so was ineffective.

Sheryl respectfully requests that this Court find that she was not adequately warned by the court that the plea agreement provision regarding the order of her sentencing was not binding on the court and that defense counsel was ineffective for failing to timely object and clarify the agreed-upon sentencing order for the court. Sheryl also requests that this Court find that her guilty pleas were rendered unknowing and involuntary by the actions of the court and her attorney.

Sheryl respectfully requests that this Court reverse the decision of the motion court, vacate her convictions and sentences, and remand the case for reinstatement on the trial docket.

CONCLUSION

Based on the arguments herein, Appellant respectfully requests that this Court overrule *Harrison v. State*, reverse the motion court's decision denying her Rule 24.035 motion, vacate Appellant's convictions and sentences, and remand the case for reinstatement on a trial docket.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Vanessa Caleb, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 15,748 words, which does not exceed the 31,000 words allowed for an appellant's brief.
2. The floppy disk filed with this brief contains a copy of the brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on November 21, 2001. According to that program, the discs provided to this Court and to the Attorney General are virus-free.
3. One disk and two true and correct copies of the above and foregoing were mailed, postage prepaid, to Karen L. Kramer, Assistant Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri, 65109, on this 20th day of November, 2002.

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